Supreme Court of the United States

October Term, 1960

No.

PORTSMOUTH BASEBALL CORPORATION,
Petitioner,

against

FORD C. FRICK, Commissioner of Baseball; BALTIMORE BASEBALL CLUB, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Opinions Below 1

Grounds On Which Jurisdiction Is Invoked 2

Questions Presented for Review 2

Statement of the Case 2

Basis for Federal Jurisdiction in the District Court 4

Reasons Relied on for Allowance of the Writ 5

Question One—An agreement, the basic reason for which is the elimination of competition must be deemed to include within its scope public media of communication invented or developed subsequent thereto 5

Question Two—The Court of Appeals ruling that Rule 1(a) was not susceptible of the construction that it applied to broadcasting into Minor League territory stemmed from a narrow reading of the rule apart from its context in baseball and in total disregard of its purpose 6

Question Three—The petitioner could not have intended by the last agreement to bargain away its very existence 8

Appendix:

Opinion of United States Court of Appeals for the Second Circuit 13

Opinion of United States District Court for the Southern District of New York 26

Judgment 29

Contract Quoted

PAGE

Major-Minor League Rule 1(a) 3, 4

Authorities Cited

Corbin on Contracts Sec. 542 (1951) 6, 7

Comment of Judge Learned Hand (Proceedings of a Special Session to Commemorate Fifty Years of Federal Judicial Service by the Honorable Learned Hand, Court of Appeals for Second Circuit, April 10, 1959, p. 28 7

IN THE

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered May 6, 1960, affirming the judgment of the District Court which dismissed the complaint at the end of plaintiff's case.

Opinions Below

The opinion of the Court below is reported at 278 F. 2d 395 and a copy is appended to this petition (p. 13, *infra*). The opinion of the Trial Court is reported at 171 F. Supp. 897, and a copy is appended to this petition (p. 26, *infra*).

Grounds On Which Jurisdiction Is Invoked

The date of the judgment sought to be reviewed and the time of its entry is May 6, 1960. A copy of this judgment is appended to this petition (p. 29, *infra*). An application to extend petitioner's time within which to petition for certiorari was granted till August 12, 1960. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is United States Code, Title 28 § 1254(1).

Questions Presented for Review

This action is brought by the Portsmouth Baseball Corporation (hereinafter called Portsmouth) against the two major leagues and the Commissioner of Baseball to recover damages sustained by reason of their televising major league baseball games in violation of the territorial rights of Portsmouth which are clearly defined by contract. Three questions are pointed out for consideration.

Question One. Should not an agreement the basic reason for which is the elimination of competition be deemed to include within its scope public media of communication invented subsequent thereto?

Question Two. Should not the Major-Minor League Rule 1(a) have been interpreted in the light of its context, its purpose and the practical interpretation given by the parties?

Question Three. Should the petitioner be deemed to have intended to bargain away its very existence?

Statement of the Case

Petitioner, Portsmouth, is a minor league baseball club which, before the events complained of herein, was the owner and holder of a franchise to exhibit professional

baseball in Portsmouth, Virginia, under the system of organized major and minor league baseball. Petitioner was a member of the Piedmont League, a minor league which in turn was a member of the National Association of Professional Baseball Leagues, hereinafter referred to as the National Association, an association which represents and acts for the Minor Leagues and their constituent members.

Respondents are (1) Ford Frick, Commissioner of Baseball, (2) the National League of Professional Baseball Clubs, an unincorporated association known as the National League, (3) its eight constituent clubs, (4) the American League of Professional Baseball Clubs, an unincorporated association known as the American League, (5) its eight constituent clubs.

This suit involves a claim by petitioner that the right to territorial protection which a Minor League Club enjoys as against the Major Leagues by virtue of Major-Minor League Rule 1(a) (hereinafter referred to as Rule 1(a)), includes the right to be protected against broadcasts and telecasts of Major League games into its territory.

At the time this action was instituted in November, 1954, Rule 1(a) read, in pertinent part:

"Rule 1

CIRCUITS

"(a) Protection of National Association Territory. No territory in which a Minor League franchise is being operated under protection of the Major-Minor League Agreement or National Association Agreement shall be included in any Major League until such Minor League and Minor League Club shall be paid such compensation as shall be mutually agreed upon as just and reasonable compensation for such action. A Major League club desiring to acquire Minor League territory must file notice of its intention to do so with the Commissioner between October 1st and December 1st. * * * "

The rule further provided that, in the event of disagreement as to the proper compensation, the disagreement shall be resolved by a Board of Arbitration appointed by the Commissioner upon request of the "Major League desiring to occupy the Minor League territory * * *." The Commissioner is directed to designate a time and place for a meeting of the Board not less than 30 days after the request. The rule further provides:

> "The board of arbitration shall after investigation and hearings determine the amount of just and reasonable compensation or other conditions under which the Minor League territory may be included in a Major League; and shall notify the interested parties within 10 days after reaching their conclusions. The findings of the board of arbitration shall be final and unless complied with by the Major League Club within thirty (30) days the territory shall remain Minor League territory.
>
> "Within ten days after the findings of the Board have been complied with, the Minor League territory shall be considered Major League territory and have territory protection provided in Paragraph B hereof."

At the close of petitioner's case in the District Court the respondents moved for a judgment dismissing the action. This motion was granted. The United States Court of Appeals unanimously affirmed this judgment of the District Court.

Basis for Federal Jurisdiction in the District Court

The basis for Federal jurisdiction in the District Court is believed to be United States Code, Title 28, § 1332.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

QUESTION ONE

An agreement, the basic reason for which is the elimination of competition must be deemed to include within its scope public media of communication invented or developed subsequent thereto.

To state the question in reverse, is it possible that parties who agree not to compete may have legally recognized mental reservations that new inventions may be employed by them to promote a far more drastic form of competition than the competition which the agreement of its very nature sought to avoid? The determination of this question as it affects contracts drawn in the past is of particular public importance in this rapidly expanding era of electronic, nuclear and rocket experiment. It does not seem plausible to hold that new scientific advances creating competition of an even more aggressive nature shall be deemed to be outside of the contemplated protection which the principals to a contract basically intended. It is the protection of the non-competitive element that is the gist of the entire contract and not the means or method of competition guarded against. The latter element is only secondary but should be considered in the light of consummating the primary purpose of the agreement.

The error committed by the lower Court presents a vexatious precedent. It renders existing, valid contracts of limitless businesses affecting untold wealth completely ineffective and obsolete. It means that protective contracts such as for example those effecting transportation, communication and energy of every shape and form may have become wholly ineffective and obsolete in whole or in part because a new media of transportation, communication or energy may have been developed and which did not exist at the time the contract was executed. The greater the development of public media the stronger is the means of competing.

In further illustration of this point, the law is not blind to purpose and accomplishment. It has long since been held that drilling a hole in the bottom of a silo to let the grain flow out constitutes a breaking and unlawful entry.

Reductio ad absurdum, it certainly would be illogical to maintain that a treaty between two nations not to invade the other's territory but executed in the era of commandos and invasion barges has become *nudum pactum* in the era of intercontinental ballistic missiles.

It is just as illogical to hold that baseball cannot be physically played on a baseball diamond in a territory but that it is valid to beam pictures of a game into every home and amusement enterprise in the area. That could never have been the intention of the parties whether foreseeable or not. They never basically intended to protect against competition and at the same time to tolerate complete destruction. That is exactly what has happened—the petitioner has not been bombed but beamed out of existence. It was the continued existence of the Minor League team that was contemplated—not its demise.

The holding of the lower Court in this case will open the flood gates to a deluge of litigation the determination of which will require time without limitation.

QUESTION TWO

The Court of Appeals ruling that Rule 1 (a) was not susceptible of the construction that it applied to broadcasting into Minor League territory stemmed from a narrow reading of the rule apart from its context in baseball and in total disregard of its purpose.

This is erroneous in a field as laden with tradition, unique practices, and unwritten rules as is baseball. As Professor Corbin has suggested,

> "It is sometimes said that if the words of a contract are plain and clear, evidence of surrounding

> circumstances to aid interpretation is not admissible. But some of the surrounding circumstances always must be known before the meaning of the words can be plain and clear; and proof of the circumstances may make a meaning plain and clear when in the absence of such proof some other meaning may also have seemed plain and clear." Corbin on Contracts, Sec. 542 (1951).

It may be conceded that when 1(a)'s predecessor was incorporated into the first Major-Minor agreement, radio broadcasting, in its infancy and of no consequence to baseball, was not in the minds of the parties. And, of course, broadcasting and telecasting were not mentioned by their terms in 1946 when Rule 1(a) was changed to substantially its present form. But we think it plain that by 1(a) the parties intended to establish a basic principle having the generality and adaptability of a "constitutional" provision, and to lay down a rule broad enough to protect a minor club against any future violation of its territorial rights, including that accomplished by telecasting.

In interpreting a contract like the one in the present case, no sounder guide can be offered than the recent words of Judge Learned Hand:

> "• • • [T]he greatest part [of law] consists of the interpretation of words. Of course, as you know, there have been many sages who have spoken on this, and I do not know that it has got us very much further. Aristotle said it pretty well, but not quite in these words. However, the substance was that when you are interpreting words, you must remember that they cover many diverse instances, which cannot be foreseen. Interpretation is necessarily an act of creative imagination; you must try to put yourself in the place of the author of those words and fabricate how he would have dealt with the instance that has arisen."
>
> Proceedings of a Special Session to Commemorate Fifty Years of Federal Judicial Service by the Honorable Learned Hand, Court of Appeals for the Second Circuit, April 10, 1959, p. 28.

The concept of "territorial rights" is one of the hallmarks of baseball, and is indispensible to its existence.

Yet, crucial as they are, the existence and meaning of territorial rights are not expressly spelled out in all the relationships of baseball. They are apparently derived from an interpretation of the integrated series of agreements and rules, an interpretation which takes account of and is dictated by the needs and purposes of baseball.

The obvious aim of the right to operate within specific geographic areas is to afford the franchise holder protection against competition within his area, an aim which has been justified as necessary for the preservation of the "sport." The exclusivity contemplated is complete. There may be no interference with another's territory which impairs that competitive position.

QUESTION THREE

The petitioner could not have intended by the last agreement to bargain away its very existence.

The Court of Appeals, tracing the sequence of agreements between the Majors and the Minors as entered into at intervals during the changing years:

(1) before Radio and Television; and

(2) after the advent of Radio and Television,

particularly emphasized the final agreement dated January, 1954 which was not only subsequent to Television, but also subsequent to the course of action complained of, and subsequent to a widespread controversy between the Majors and Minors, concerning the fact that the Major League Clubs were in the course of annexing and adding to that audience before which they were properly and legally entitled to present exhibitions of baseball games, an additional audience, namely, the audience in the territory of

the Minor League Clubs—through the medium of Television which opened the doors to that wider audience—in violation of the so-called Sacred Rule of Baseball, the Territorial Rule, which secured to the Minor League the exclusive right in its particular territory to present an exhibition of a baseball game or contest to the audience in that territory.

Hence, the Court of Appeals, while dwelling upon its interpretation of the Territorial Rule in the last mentioned contract and arguing the point that invasion of Minor League Club Territory through the medium of Television had not been *explicitly* prohibited by the re-incorporated and or revised Territorial Section,

(1) begged or ignored the important and vital question raised by the instant case; and

(2) failed to recognize the logical conclusion resulting from the premises of its own interpretation, i.e., that if the most recent contract and particularly, the Territorial Clause, were to be interpreted either in accordance with the reasoning of the Court of Appeals or with the reasoning of the District Court or with the reasoning of the defendants, then the new contract

(a) was so utterly lacking in reciprocal obligation; and

(b) resulted from such disparity of bargining power that: just as in the so-called "yellow-dog contracts", the Court should have deemed it necessary

(1) to equalize bargaining power; and

(2) to establish that equality of position between the parties—in which Liberty of Contract begins.

And the Court should further have recognized that, therefore, its own interpretation—logically pursued—conferred upon the Court a duty to grant the same Constitutional Protection to those engaged in the great American

sport and business of baseball as in the past the Highest Tribunal in our land had granted to citizens employed in industry.

The Court of Appeals ignored the reality of television and revealed a reluctance to view television objectively similar to the historic reluctance of earlier Courts to consider the facts and consequences of the Industrial Revolution.

The Court of Appeals failed to recognize courageously that a realistic, scientific scrutiny of television raises a question with a variety of implications concerning rights arising from contracts as well as from the Constitution itself.

Are the economic consequences of violation of a contract through the medium of television to be ignored?

Are invasions of the rights of a party to a contract to be condoned if the invasions are effected through the medium of television?

Are acts utilizing the medium of television in an exempted, isolated, excepted class—rendered permissible and not to be subjected to the same criteria as other acts to which are applied old, well-settled principles of the Common Law as well as Constitutional Principles enunciated by the Supreme Court?

Has television created an island, a new and lawless frontier wherein acts violating the spirit and letter of contractual agreements and of the Constitution are exempted from application to them; of the Common Law and of the Constitution alike?

Where a contract is construed without due regard or reference to contemporary reality, to realistic analysis of changes wrought by the physical sciences, or to not only the basic economic consequences of television but also its philosophical implications,—is not the resulting interpre-

tation a legal fiction and an arbitrary exercise of judicial authority which abridges freedom of contract?

It is respectfully submitted that television should not be considered as a thing apart—a mere electronic device—the *use* of which is subject to regulation only by an administrative agency.

Television should be considered *ab initio* in its basic elements—and the instant case illustrates that the Major League Clubs by their free, voluntary and financially remunerative use of Television to enlarge their baseball contest audience by addition to it of the audience in Minor League territory either

(a) thus violated the sacred territorial rights of the Minors as set forth forth in their contract

or

(b) conspired to frame a contract which was a contemporary equivalent of the type of contract that our Highest Court has found to be repugnant to the Constitution and to violate basic human rights.

Wherefore, it is respectfully submitted that this petition for Writ of Certiorari to review the judgment of the Court of Appeals for the Second Circuit should be granted.

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APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 195—October Term, 1959

(Argued February 9, 1960 Decided May 6, 1960)

Docket No. 25659

—o—

PORTSMOUTH BASEBALL CORPORATION,
Plaintiff-Appellant,

against

FORD C. FRICK, Commissioner of Baseball;
BALTIMORE BASEBALL CLUB, INC., *et al.*,
Defendants-Appellees.

—o—

Before:

MOORE, *Circuit Judge*, and
SMITH and HERLANDS, *District Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Dimock, *District Judge*, reported at 171 F. Supp. 897, dismissing the complaint at the end of plaintiff's case.

Affirmed.

JAMES P. McGRANERY, Washington, D. C. (LEONARD J. EMMERGLICK, Washington, D. C. and GAREY AND GAREY, New York, N. Y., on the brief); for Appellant.

MARK F. HUGHES, New York, N. Y. (BAKER, HOSTETLER & PATTERSON, New York, N. Y. and WILLKIE FARR GALLAGHER WALTON & FITZGIBBON, New York, N.Y., on the brief), for Appellees.

HERLANDS, *District Judge*:

The question posed upon this appeal is: Does the broadcasting and telecasting of Major League baseball games into Minor League territory constitute an act of occupation or appropriation of such Minor League territory by the Major League teams, within the meaning of a certain agreement regulating the competitive territories between the Major and Minor Leagues and their teams? The issue is one of contract interpretation.

This breach-of-contract action was commenced on November 22, 1954.[1] The roots of the litigation, however, may be traced back to 1903, the year when the Major and Minor Leagues first agreed upon a rule regulating their respective circuits and territorial rights. That rule, known as Major-Minor League Rule 1, is the contract for breach of which plaintiff has brought this action to recover $250,000. damages.

Plaintiff is the corporate owner of a franchise to operate a Minor League baseball club in Portsmouth, Virginia. The nineteen defendants are: the Commissioner of Baseball; the American League of Professional Baseball Clubs (hereinafter the "American League") and its eight constituent clubs, and the National League of Professional Baseball

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[1] Plaintiff unsuccessfully moved to amend the complaint by adding an antitrust conspiracy claim. *Portsmouth Baseball Corporation v. Frick*, 21 F. R. D. 318 (S. D. N. Y. 1958). Defendant Frick unsuccessfully moved to dismiss the complaint as to himself. *Portsmouth Baseball Corporation v. Frick*, 132 F. Supp. 923 (S. D. N. Y. 1955).

Clubs (hereinafter the "National League") and its eight constituent clubs.

A national association, known as the National Association of Professional Baseball Leagues (hereinafter "National Association") represents the Minor Leagues. The National Association entered into a contract with the National League, representing the owners or operators of National League Baseball teams, and the American League, representing the owners or operators of American League Baseball teams.

One of the Minor Leagues represented by the National Association was the Piedmont League. Plaintiff was a member of the Piedmont League.

The contract between the Minor Leagues (represented by the National Association) and the Major Leagues (represented by the National and American Leagues) is known as the "Major-Minor League Agreement." This contract is supplemented by mutually agreed-upon formal rules, known as the "Major-Minor League Rules." The particular rule around which this case pivots as Major-Minor League Rule 1(a).

Major-Minor League Rule 1(a) must be kept in sharp focus because there are several other separate and distinct professional baseball agreements and rules which, however, do not regulate the relations between the Major and Minor Leagues. It is a necessary caveat that the identity and language of Major-Minor League Rule 1(a) is not to be confused with the provisions of other agreements and rules regulating the baseball business within the Major Leagues themselves [2] and within the Minor Leagues themselves [3]

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[2] For example, Major League Agreement (Plaintiff's Exh. 3); Major League Rule 1(d), in effect April 14, 1936 (Plaintiff's Exh. 5A) and amended October 15, 1949 (Plaintiff's Exh. 6); Television Agreement among National League Clubs (Plaintiff's Exh. 9).

[3] For example, National Association Agreement (Plaintiff's Exh. 61).

but not between the Major and Minor Leagues. Reference will be made to these other and different agreements (as well as to certain conversations and writings) only because one of plaintiff's basic arguments is that they supply competent evidence of a practical construction by the parties of the allegedly ambiguous language of Major-Minor League Rule 1(a).

The complaint, filed on November 22, 1954, accuses defendants with having continuously violated Major-Minor League Rule 1(a) from the spring of 1949 until the close of the 1954 baseball season. It charges that the plaintiff has suffered $250,000 damages caused by defendants' having "appropriated the territory of the plaintiff, * * * without compliance with the requirements of, and in violation of [Major-Minor League] Rule 1-A." The complaint further alleges:

> "By practical construction and application by defendants, Rule 1-A has been interpreted and applied to prohibit appropriation of territory by broadcasting by television and radio."

The complaint declares that defendants' violations of Major-Minor League Rule 1(a) "have included principally the broadcasting by radio and the exhibition through the medium of telecasting and television and rebroadcasting and retelecasting, of games played between Major League teams into the territory covered by the plaintiff's franchise, in violation of Rule 1-A."

The gist of defendants' position is that the terms of Major-Minor League Rule 1(a) are clear and unambiguous and that they do not relate to radio broadcasting or telecasting.

Plaintiff called as its witnesses the defendant Ford C. Frick, the Commissioner of Baseball, and Frank D. Lawrence, plaintiff's principal stockholder. Frick testified that the problem of broadcasting and telecasting has been a troublesome one ever since the development of television;

and that during the years 1951 to 1954 there were Minor League complaints about telecasting of Major League games in or into Minor League territory.

Lawrence testified that, beginning about 1950, there was a drop in local attendance caused by the broadcasting and televising of Major League games within plaintiff's territory. The entire Piedmont League, of which plaintiff was a member, ceased operating in 1955.

Frick further testified that there had been correspondence between him and Lawrence on the subject of television and radio broadcasting, but that this correspondence did not result in an arbitration-compensation proceeding under Major-Minor League Rule 1(a). Frick told Lawrence (specifically, in January 1954) why he disagreed with the latter's assertion that it was a violation of Minor League territorial rights to broadcast or televise Major League baseball games into Minor League territory. The conversation is denied by Lawrence.

The correspondence between Frick and Lawrence is represented by eight letters (Plaintiff's Exhs. 12 to 19, inclusive). These exhibits silhouette the facts that, while Lawrence and Frick recognized the seriousness of the radio and television problem, Frick consistently claimed that they would not be permitted by the Antitrust Division of the United States Department of Justice to make any restrictive radio or television agreements; that the roblem could not be solved until the Major League's own rules were revised to a point where they would be accepted by the courts and by Congress; that a Special Committee representing the Major and the Minor Leagues had been appointed to study the problem and to make recommendations concerning radio and television; and that the Department of Justice had turned down certain proposals suggested by the Commissioner of Baseball.

Elaborating the foregoing facts, Frick testified that, as a result of the attitude of Congressional Committees and the Department of Justice, he had told Lawrence that the

only hope for solving the problem legally was through legislation; that efforts had been made by him and by counsel to obtain some clarification of the problem from the Department of Justice; and that the Department of Justice had threatened an antitrust action if Frick attempted to get the Major League clubs to agree to restrict broadcasting and telecasting.

We turn now to a detailed consideration of Major-Minor League Rule 1(a). The record contains three editions of that rule: the rule as it existed up to December 1946 (Defendants' Exh. C); the rule as amended in December 1946 (Plaintiff's Exh. 5B); and the rule as amended in January 1954 (Defendants' Exh. D).

The primary significance of the December 1946 and January 1954 amendments is largely of a negative nature; that is, despite the pendency of the broadcasting and telecasting problem and the parties' awareness of it, the said amendments related entirely to other matters. Moreover, the history of the rule is illuminating: it was first adopted in 1903, when radio and television broadcasting were nonexistent and, hence, the parties' intentions cannot reasonably be said to have adverted to the broadcasting and televising of baseball games when they adopted the rule to define their respective territorial rights.

Major-Minor League Rule 1, as it read up to December 4, 1946, provided:

"RULE 1.

CIRCUITS.

Protection of National Association Circuits.

(a) No city in which a club of the National Association is located shall be included in the circuit of a Major League unless such league shall pay to the league in the National Association of which such city may be a member the sum of $5,000, and unless the Major League club in question shall pay to the Minor League

club in the said city such reasonable compensation for damage to its assets as may be determined by agreement or fixed by the Commissioner.

Protection of Major League Circuits.

(b) To insure as far as possible the continuance of Major League baseball in cities now able to support it, the existing circuits of the Minor Leagues shall not be so changed as to include any city in a Major League circuit or any place within five miles thereof without the written consent of the league concerned."

The above rule, as amended and re-adopted in December 1946, preserved paragraph (b) intact, but amended paragraph (a) by changing the provision for the payment of reasonable compensation to be paid to a Minor League and a Minor League Club when the territory in which a Minor League franchise is being operated shall be included in a Major League. The 1946 amendment of paragraph (a) set up a procedure before a seven-man Board of Arbitration if the parties themselves could not agree upon the compensation.

Major-Minor League Rule 1(a), as amended in December 1946 provided:

"Rule 1.

Circuits.

(a) Protection of National Association Territory. No territory in which a Minor League franchise is being operated under protection of the Major-Minor League Agreement or National Association Agreement shall be included in any Major League until such Minor League and Minor League Club shall be paid such compensation as shall be mutually agreed upon as just and reasonable compensation for such action.

In the event of disagreement as to what constitutes just and reasonable compensation for such action, the

Major League desiring to occupy the Minor League territory shall notify the Commissioner of their desire and request that the just and reasonable compensation required to be paid, be determined by a board of arbitration. Upon receipt of such notice the Commissioner shall forthwith appoint a board of seven (7) men to consist of one (1) representative of the Minor League involved, one (1) representative of the Minor League Club involved, one (1) representative of the Major League involved, one (1) representative of the Major League Club involved, the President of the National Association, the Commissioner, and a seventh party to be agreed upon by the aforementioned six or if they cannot agree on a seventh member then the Commissioner shall appoint a seventh member.

The Commissioner shall designate a time and place for a meeting of such board which meeting shall be held within 30 days of the receipt by the Commissioner of request for appointment of such board.

The board of arbitration shall after investigation and hearings determine the amount of just and reasonable compensation or other conditions under which the Minor League territory may be included in a Major League; and shall notify the interested parties within 10 days after reaching their conclusions. The findings of the board of arbitration shall be final and unless complied with by the Major League Club within thirty (30) days the territory shall remain Minor League territory.

Within ten days after the findings of the board have been complied with, the Minor League territory shall be considered Major League territory and have territory protection provided in Paragraph B hereof."

The January 1954 amendment of Major-Minor League Rule 1(a) left paragraph (b) unchanged, but amended paragraph (a) by adding the following sentence:

"A Major League club desiring to acquire Minor League territory must file notice of its intention to do so with the Commissioner between October 1st and December 1st."

Major-Minor League Rule 1 was promulgated and adopted by the parties pursuant to the provisions of a contract known as the Major-Minor League Agreement. The first Major-Minor League Agreement was entered into in 1903 by the two Major Leagues and the National Association. The Major-Minor League Agreement (Plaintiff's Exh. 4) in force at the times material to this litigation, was adopted in December 1951 and became effective on January 12, 1952 for the period from the latter date to January 12, 1957. It provides *inter alia* that, upon formal acceptance by the Major and Minor Leagues, any rules shall become binding upon them and shall not thereafter be amended "except by the concurrent action of said Leagues."

The phraseology of Major-Minor League Rule 1(a) unambiguously indicates that it applies only to the physical occupation of Minor League territory as distinguished from broadcasting or telecasting of Major League baseball games in or into Minor League territory. (1) The words that no Minor League territory "shall be included in any Major League" until certain compensation is paid does not logically pertain to a situation where a Major League game is broadcast from a station located in the territory of the Minor League club. (2) The provision relating to the situation where a Major League desired to "occupy" Minor League territory connotes physical occupation and does not reasonably convey the thought of broadcasting or televising baseball games in or into Minor League territory. (3) The expression "to acquire Minor League territory" indicates factually that the parties contemplated only physical occupation and acquisition of Minor League club territory by a Major League club. (4) Major-Minor League Rule 1(a) contemplates the complete physical occu-

pation by a Major League of a Minor League club's territory and not merely such a partial interference as might be involved in broadcasting in or into the Minor League club's territory. This is demonstrated by the last paragraph of Rule 1(a) which provides that, when an award of compensation has been duly completed and complied with, the Minor League territory shall be considered Major League territory and shall be protected as provided in Rule 1(b). Paragraph (b) provides that Major League territory cannot be invaded by a Minor League; hence, the Minor League club had no rights whatsoever and would not be able to play at all in the territory thereafter occupied by the Major League club—a situation not obtaining when a Major League game is merely broadcast or telecast in or into Minor League territory. (5) the heading of the rule is "Circuits." Rule 1(b) is entitled "protection of Major League Circuits." This shows that the rule refers to the territories in which clubs in a league carry on their physical operations and play their games and to changes in the make-up of these leagues and circuits.

Because Major-Minor League Rule 1(a) is clear and unambiguous, it cannot be stretched by resorting to an interpretation allegedly resulting from the subsequent conduct of the parties. Where, as here, the contract is plain and definite, the doctrine of practical construction does not apply. See *Liebeskind* v. *Mexican Light & Power Co., Ltd.*, 116 F. 2d 971, 974 (2d Cir. 1941); *A & P Corrugated Box Corp.* v. *St. Regis Paper Co.*, 134 F. Supp. 564, 570 (D. Mass. 1955); *Brainard* v. *New York Central R.R. Co.*, 242 N. Y. 125, 133 (1926); *Heller & Henretig, Inc.* v. *3620—168th Street, Inc.*, 302 N. Y. 326, 330 (1951); *Gearns* v. *Commercial Cable Co.*, 293 N. Y. 105, 109 (1944); *Restatement, Contracts*, section 235(e), esp. Illustration 12, at p. 327; 3 Williston, *Contracts*, section 623, pp. 1793-1794 (rev. ed. 1936); *Corbin on Contracts*, section 542 (1951).

Out of abundant caution, the trial judge, acting on the assumption *arguendo* that evidence of practical construc-

tion was admissible, permitted plaintiff (over defendants' objection) to adduce proof of the parties' acts and writings supposedly constituting a construction of Major-Minor League Rule 1(a) in favor of a prohibition against Major League broadcasting from a station located in a Minor League club's territory. But the facts so adduced by plaintiff did not measure up to the controlling criteria of practical construction.

To show a practical construction by acts there must have been conduct by the one party expressly or inferentially claiming as of right under the doubtful provision, coupled with knowledge thereof and acquiescence therein, express or implied, by the other. *Niagara Falls International Bridge Co.* v. *Grand Trunk Railway of Canada*, 212 App. Div. 705, 710, 209 N. Y. S. 79 (4th Dept. 1925), modified on other grounds, 241 N. Y. 85 (1925); 3 *Corbin on Contracts*, section 558, p. 144 (1951).

The cases relied on by plaintiff are to be sharply distinguished from the factual situation herein. For example, in *District of Columbia* v. *Gallaher*, 124 U. S. 505 (1888), performance deviating from the terms of a construction contract had been "consented to by both parties" (at 507). In *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273 (1897) a "uniform practice" followed by the defendant insurance company prior to the issuance of the insurance policy in question and continued for more than two years thereafter, was held to constitute a practical construction of the contract.

The record does not disclose a single instance where the defendants, by act or statement, agreed with or acquiesced in any Minor League assertion that the rule in question encompassed Major League broadcasting or telecasting into Minor League territory.

On the contrary, the evidence affirmatively demonstrated: (1) that the defendants consistently disputed the existence of plaintiff's claimed right to protection against Major League broadcasting and telecasting, for reasons that

were stated to plaintiff; (2) that, despite the persistence and mutual awareness of the problem, the parties never amended Major-Minor Rule 1(a) to deal with that problem, although the rule was amended in other respects in December 1946 and in January 1954, and although the Major Leagues themselves [4] and the Minor Leagues themselves [5] dealt with the problem in their own respective league rules; (3) that, because a restrictive agreement concerning broadcasting and telecasting was subject to the danger of adverse Congressional Committee action and prosecution by the Department of Justice, the defendants' position expressed to the plaintiff was that the only sound solution was by legislation; (4) that in 1951, yielding to pressure from the Antitrust Division of the Department of Justice, the defendants rescinded their own rule (Major League Rule 1[d]) regulating broadcasting and telecasting; and (5) that the parties had not anticipated or contemplated the advent of radio and television when they first formulated Major-Minor League Rule 1(a) in 1903 and thereafter continued the same basic provision.

None of the acts and declarations of the parties in seeking a solution of the broadcasting and telecasting problem

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[4] The two Major Leagues entered into a Major League Agreement (Plaintiff's Exh. 3) on November 1, 1946. This was a successor agreement to similar contracts executed on January 12, 1921, amended on December 12, 1944 and February 3, 1945. The 1921 contract created the office of Commissioner of Baseball. Pursuant to the Major League Agreement, Major League Rules were adopted by the Major League for their own government.

Major League Rule 1[d]—as originally adopted (Plaintiff's Exh. 5A) and as amended (Plaintiff's Exh. 6)—regulated broadcasting and telecasting. As a result of a Department of Justice investigation, this rule was rescinded in 1951.

[5] The National Association Agreement (Plaintiff's Exh. 61), section 10.06(f) regulates broadcasting and telecasting by Minor League clubs in all Minor Leagues of all classifications. At the time of the trial herein, there were approximately twenty-eight Minor Leagues.

indicated an agreement that Major-Minor Rule 1(a) was already a contract covering it.

No doubt radio and television have had an adverse effect on attendance at baseball games, theatres and concerts. But this radical change in the manner in which the public chooses to be entertained cannot create contractual rights or obligations not within the fair intendment of the parties. The impact of radio and television has posed problems of policy and legality not contemplated when Major-Minor League Rule 1 (a) was adopted.

While contracts may be interpreted with some elasticity to meet change and development during their existence, the contract herein was not adaptable to the drastic changes that have occurred. To apply the particular rule as covering broadcast and telecast competition would be to write a new contract beyond the parties' contemplation and intent. This cannot be done in the guise of judicial interpretation.

The trial court properly dismissed the action.

Affirmed.

Opinion of United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PORTSMOUTH BASEBALL CORPORATION, a corporation of Virginia,

Plaintiff,

v.

FORD C. FRICK, Commissioner of Baseball, *et al.*,

Defendants.

February 13, 1959.

GAREY & GAREY, New York City, for plaintiff.

WILLKIE, FARR, GALLAGHER, WALTON & FITZGIBBON, New York City, for defendants.

DIMOCK, *District Judge*, orally.

My own determination is that Major-Minor League Rule 1(a) is not susceptible of the construction that it has application to the broadcasting or telecasting of baseball games in or into Minor League territory. It seems to me that it applies plainly only to the physical occupation of Minor League territory.

There are a great many indications of that in the rule. A statement that no Minor League territory shall be "included" in any Major League is utterly inappropriate for conveying the idea of broadcasting or telecasting baseball games in or into Minor League territory.

By no stretch of the imagination would Minor League territory be "included" in a Major League if all that was happening was that the Major League games were being broadcast from a station located in the territory of the Minor League club, and again the description of a Major League desiring to "occupy" Minor League territory is inappropriate for conveying the idea of broadcasting or televising baseball games in or into Minor League territory. The word "acquiring" Minor League territory, which was used in the 1954 amendment, is a clear indication that in that year, at least, the parties did not have in mind broadcasting or telecasting in or into that territory.

When the rule describes what the plaintiff would say is a mere application by a Major League for arbitration as to the amount to be paid for broadcasting from a station in the territory of a Minor League club, the rule speaks of the Major League desiring to occupy the Minor League territory, and it is the Major League, not the Major League club, that makes the application for arbitration.

More important still I think is the fact to which I called Mr. Emmerglick's attention, that the rule contemplates complete occupation of the Minor League club's territory.

That last paragraph of Rule 1(a) provides that when the award has been completed and complied with, the Minor League territory shall be considered Major League territory and be protected as provided in paragraph (b).

(b) provides, in substance that Major League territory cannot be invaded by a Minor League, so that the old Minor League club would not be able to play at all.

This indicates clearly that Rule 1(a) contemplates the complete occupation by a Major League club of a Minor League club's territory and not merely such a partial interference as might be involved in broadcasting in or into the Minor League club's territory.

That is my own finding with respect to the interpretation of Rule 1(a), that it is not ambiguous, and that there

is no room for interpretation by the acts of the parties, but I thought best to take the evidence with respect to the acts of the parties which are supposed to have constituted a construction of the rule in favor of prohibition against Major League broadcasting from a station located in a Minor League club's territory, but none of that evidence which has been introduced, it seems to me comes within what is necessary to constitute an interpretation by the acts of the parties.

All of the evidence constitutes talks, writings, agreements and letters. No act of the party construing the rule so as to prohibit broadcasting by a Major League from a station in a Minor League's territory was shown.

Another defect which exists in the proof, so far as constituting interpretation by acts of the parties is concerned, is that I could not note a single instance where there was action or even acquiescence by the people on the Major League side to any demand made upon the part of somebody on the Minor League side.

Then there is a further defect, if Mr. Hughes is right with regard to the rule, with respect to the practical interpretation by acts of the parties, that there certainly was never even unanimous communication and acquiescence of all of the parties who would be concerned in the interpretation of the contract.

The long and short of it is that the advent of radio and television broadcasting was something that was not contemplated by the agreements and the rules. Everybody in the room seems to have agreed that extremely serious problems have been created by the advent of radio and television broadcasting—problems that require a pretty prompt solution if serious damage is not going to be done, but I do not think that the problems can be solved by an interpretation of the existing agreements of those concerned in baseball.

So that the motion to dismiss at the end of the plaintiff's case is granted.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of May one thousand nine hundred and sixty.

Present:

HON. LEONARD P. MOORE,
Circuit Judge,
HON. J. JOSEPH SMITH,
HON. WILLIAM B. HERLANDS,
District Judges.

—o—

PORTSMOUTH BASEBALL CORPORATION,
a corporation of Virginia,
Plaintiff-Appellant,

against

FORD C. FRICK, Commissioner of Baseball, *et al.*,
Defendants-Appellees.

—o—

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

A. DANIEL FUSARO,
Clerk.